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Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1998

ROBERT W. COLLIN
Petitioner,

v.

UNIVERSITY OF VIRGINIA, William Lucy; David Phillips; A. Bruce Dotson; Richard Collins; Daphne Spain; Timothy Beatley; and Harry Porter,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Dated: November 25, 1998

50 pp

QUESTIONS PRESENTED FOR REVIEW

I. Can a state university professor be blacklisted and employment terminated for advocating for racial equality under the law?

II. Can a paid employee of the Commonwealth of Virginia adjudicate a race discrimination case against his employer?

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October Term, 1998

ROBERT W. COLLIN, *Petitioner,*

v.

UNIVERSITY OF VIRGINIA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Robert W. Collin, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of Appeals (App. A *infra,* p. a,) is unpublished. The opinion of the district court is unpublished.

JURISDICTION

The Court of Appeals entered its judgment on August 31, 1998 (App. A *infra,* p. a). The jurisdiction of this Court is invoked under 28 U.S.C. s 1254(1).

STATUTORY PROVISIONS INVOLVED

The Civil Rights Act of 1964, s 701 et seq., as amended, 42 United States Code s 2000e, et seq. 42 U.S.C.A. s2000e-3(a) ...has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 United States Code s 1983

Every person who under color of any statue, ordinance, regulation, custom, or usage...subjects...any person within the jurisdiction thereof to the deprivation of any rights, privilege, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 United States Code s 1981

All persons within the jurisdiction of the United States shall have the same right in every state and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes,

licenses and exactions of every kind, and no other.

28 United States Code s 455 (a)
Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

CONSTITUTIONAL PROVISIONS
Amendment I of the United States Constitution
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press: or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV of the United States Constitution
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article III, s 1 of the U.S. Constitution
The judicial powers of the United States, shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

STATEMENT

A. Statement of Facts

Petitioner is a white man who began working for the Department of Urban and Environmental Planning of the University of Virginia (the Department) School of Architecture in 1987. In the spring of 1992, *petitioner's* class undertook a project in an African American community in Charlottesville. *Respondent* explicitly forbade *petitioner* and his students from communicating with this community. *Petitioner* was the only faculty person so restricted at the University of Virginia. However, other faculty were encouraged to go into this community. The Department denied *Petitioner* tenure and promotion in the fall of 1992. *Petitioner* also complained to the EEOC about racially hostile conditions and provided testimony in the Harris EEOC investigation on November 24, 1992. Beatley, Chair of the Department, had supported *petitioner* for tenure. But on December 23, 1992 Chair Beatley sent a letter to a prospective employer of *petitioner*, describing *petitioner's* EEOC activities as "bizarre." His letter did not address any of the *petitioner's* qualifications for

the position. The letter also references telephone calls made about this issue. Both the letter and the telephone calls were delivered while the *petitioner* was an employee of *respondent*. The prospective employer denied *petitioner* employment after they received the letter. *Petitioner* filed his complaint on Dec. 7, 1992. *Petitioner* had applied for the position with the prospective employer on November 5, 1992.

B. Proceedings Below

On November 11, 1993 *petitioner* filed a complaint in Federal District Court alleging violations of 42 U.S.C. s1981, 42 U.S.C. s1983, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. s 2000e, and First Amendment and Equal Protection provisions of the United States Constitution. *Respondents* filed a motion to dismiss all of *petitioner's* claims for failure to state a cause of action under F.R.C.P. 12 (b)(6) on March 17, 1994. On October 26, 1994, Magistrate Judge Crigler dismissed *petitioner's* Title VII claims except as to Dean Porter and the University of Virginia, dismissed all 42 U.S.C. s 1981 claims, and dismissed all First Amendment claims in his Report and Recommendation for failure to state causes of action. On January 3,

1995 District Judge Michael modified the Report and Recommendation dismissing *petitioner's* 42 U.S.C. s 1983 claims against *respondents* Rector and Board of Visitors, School of Architecture, and Department of Urban and Environmental Planning; and dismissing all claims under 42 U.S.C s 1981 against *respondent* Porter. *Collin v. Rector and Board of Visitors,* 1995 WL 21956 (W.D. Va. 1995). On October 20, 1995 *respondent* moved for summary judgment on all counts. *Petitioner* responded and cross motioned for partial summary judgment based upon the retaliatory letter from *respondent* Beatley to a prospective employer while *petitioner* was still employed by *respondent*. On December 6, 1995 Magistrate Crigler granted *respondent's* Motion for Summary Judgment in its entirety. *Petitioner* filed a Notice of Appeal appealing the December 6, 1995 Order of Magistrate Crigler. On December 20, 1995 *respondent* moved for costs. On February 9, 1996 *petitioner* in his reply to *respondent's* motion for costs, challenged the Magistrate's authority to issue an order for costs because of bias and partiality he uncovered in the latter stages of discovery while seeking discovery from the law school, where the

Magistrate was a paid faculty member. *Respondent* filed a Reply In Support of An Award of Costs. Collin filed a Reply Opposing an Award of Costs and Motion for Summary Judgment. On July 27, 1995, *petitioner* had complained directly to Magistrate Crigler and the state Attorney General about the failure of the court to award him the usual witness fees in *Harris v. University of Virginia,* 83 F.3d 415 (4th Cir. 1997) and on September 19, 1995 wrote directly to Magistrate Crigler protesting his exclusion from key depositions *petitioner* noticed and called. This deposition would have examined a faculty colleague of the Magistrate Judge. On September 20, 1995, *petitioner* wrote directly to opposing counsel, Magistrate Crigler and the state Attorney General, to complain about the secret sealing of his official court records, including an affidavit cited by the Magistrate in support of his Order, an affidavit which was never produced and is still absent the record. (App. A, *infra* p.j,"terms of order not preserved in record on appeal"). At this time, *petitioner* also complained to his counsel of biased conduct by the Magistrate and its effect on the integrity of the discovery process particularly as it related to the law school, where Magistrate Crigler was paid as an adjunct

professor. Magistrate Crigler granted *respondent's* motion for costs April 26, 1996.

Petitioner appealed all judgments on April 21, 1998 to the Fourth Circuit Court of Appeals. The case was scheduled for oral argument on May 5, 1998 before Judges Stamp, Motz, and Niemeyer. *Petitioner* terminated his attorney, Ms. Margaret Cain, before oral argument and substituted Mr. Gary Peller as his attorney at the oral argument. The Fourth Circuit Court of Appeals decided to decide the case on the briefs submitted without permitting oral argument.

REASONS FOR GRANTING THE PETITION

Since *Robinson v. Shell,* 117 S.Ct. 843(1995)(Justice Thomas writing for a unanimous Court) courts, federal agencies, and state legislatures have been struggling with discriminatory retaliation, especially in regards to job reference letters. It is important to note that this case was pending before *Shell* was decided by this Court. Also, Courts have struggled with discovery issues in Title VII cases since *St. Mary's Honor Center v. Hicks*, 113 S. Ct.

2742 (1993). Here, the Magistrate departed from the accepted and usual course of judicial proceedings to stop all discovery from his other employer, the *respondent*. This case is a timely and rare opportunity to provide necessary guidance, since there are systemic reasons why few cases of this nature ever reach judicial determination. Moreover, the decisions below are erroneous, and the issues addressed are important.

I. It Is An Unlawful Employment Practice to Discriminate and Retaliate Against Employees for Protected Activities

Title VII makes it an unlawful employment practice for an employer to discriminate against an employee who

> ...has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.42 U.S.C.A. s2000e-3(a).

Petitioner's protected activities were recognized in the Fourth Circuit decision (App. A, *infra*, p. k), and motivated the adverse employment action.

The Department had indicated a high degree of satisfaction and praise for *petitioner's* work in the reappointment process prior to 1989. *Petitioner's* protected activities began in 1989 with an incident involving racially motivated insubordination by a Department staff member[1] and continued up to and after the filing of this complaint. *Petitioner's* involvement in these explicitly protected activities was known to the *respondents*, and caused them to retaliate against him in the decision to deny tenure, and to pursue an active, concerted course of conduct calculated to deprive him of any future employment. The fact that *petitioner* complained about race discrimination and the racially hostile environment, through proper channels to appropriate authorities, and would not cease and desist, caused *respondents* to retaliatorily deny him a position which he was qualified to hold according to all standards of merit applied to similarly situated employees.

1. An employee of the *Respondent* refused to make necessary photocopies of *Petitioner's* Fair Housing Report because, as she told the *Petitioner* she, would never live near African American people and said,"Niggers are like whores and animals."

In similar cases after *Shell*, other circuits have explicitly used evidence of a negative reference letter to potential employers to raise genuine issues of material fact, precluding summary judgment. *Hawkins v. Astor Home for Children,* 1998 WL 142134 (S.D.N.Y. 1998); *Reynolds v. Alabama,* 1998 WL 188076 (M.D. Ala. 1998); *McCaskill v. West,* 124 F.3d 217 (10th Cir. 1998); *Hashimoto v. Dalton,* 118 F.3d 671 (9th Cir. 1997); and *Smith v. St. Louis University,* 109 F.3d 1261 (8th Cir. 1997).

The Fourth Circuit decision oversteps well developed standards for summary judgment, thwarts express Congressional intent of the 1964 Civil Rights laws, directly undercuts the plain meaning of retaliation as enunciated in *Shell*, directly conflicts with other circuits, and will fuel numerous appeals from the District courts. This decision, if allowed to stand, will sanctify blacklisting those who engage in protected activities, and will allow the pernicious misconceptions and invidious racism to incubate and spread at our institutions of higher learning.

A. *Respondent*'s Job Reference Letter To a Prospective Employer Is a Clear Violation Of Title VII

Job reference letters that describe EEOC complaints at all are black letter violations of Title VII's retaliation provisions. As noted by Judges Hall, Hamilton, and Michael of the Fourth Circuit in the lower court *Shell* decision:

> ...we may conclusively state that Shell's alleged retaliation against Robinson--said to involve the dissemination of false information and an undeservedably poor reference -- arose from their employment relationship because Shell would not have been provided the opportunity to retaliate against Robinson but for the fact that it had employed him.....**our inquiry need proceed no further,...** [emphasis added] *Robinson v. Shell,* 1995 WL 25831,*2 (4th Cir. 1995).

The letter is an adverse employment action intrinsically related to his employment with the *respondents*. *Petitioner* was and still is being denied an opportunity for meaningful employment in a position in his field because *respondent* telephoned and wrote

retaliatory responses regarding *petitioner*'s EEOC suit to one or more prospective employers. Beatley's retaliatory letter is dated December 23, 1992, and references his own retaliatory telephone calls to the same prospective employer made a short time before the letter was sent. The letter was sent on Departmental stationary, typed by the Departmental secretary, and signed by Beatley as chair of the Department. Beatley's retaliatory letter expressly references Collin's protected activities under Title VII and makes it clear that he was fully aware of Collin's EEOC claims. Beatley admits this in two affidavits. Beatley's retaliatory letter does not discuss *petitioner*'s extensive scholarly publications, or award winning teaching or public service. In fact, the letter does not address any of the ordinary criteria for academic appointments: teaching, scholarship, and public service. It is purely retaliatory. A letter can be passed around and assumes validity from its existence, as opposed to a telephone call which is relayed through the recipient and therefore retaliatory letters are even more pernicious than retaliatory telephone calls. An opportunity to pursue discovery would substantiate additional instances of blacklisting. *Petitioner* was actively

negotiating an employment contract with the recipient of the letter.

Letters that describe EEOC complaints at all are black letter violations of Title VII's retaliation provisions. *Rutherford v. American Bank of Commerce,* 565 F.2d 1162 (10th Cir. 1977), *Robinson v. Shell,* 117 S.Ct. 843 (1995). Few things are more fundamental to stopping discrimination than protecting a person's rights without the fear of retribution. Concern over employer references has recently spawned state legislative attempts to determine the rights of employer and employee. See, Note *"Addressing the Cloud Over Employee References: A Survey of Recently Enacted Legislation, 39 Wm. & Mary L. Rev. 177 (1997).* In *Shell,* the Court unanimously held that Title VII prohibits *respondents* from retaliating against former employees for participating in any proceeding under Title VII or opposing any practice made unlawful by that Act. The plaintiff in *Shell* alleged that his former employer gave him a negative job reference for his having filed an EEOC charge against it. The Court held that coverage of post-employment retaliation is more consistent with the broader context of the statue

and with the statutory purpose of maintaining unfettered access to the statute's remedial mechanisms. If employers are allowed to send job reference letters to prospective employers describing employees who engage in protected activities as "bizarre" for having engaged in these activities, then the access to the statute's remedial mechanisms is effectively terminated. In this case, not only is Title VII eviscerated, the *respondent* is free to forever blacklist *petitioner*. To permit *respondent* to exploit circumstances peculiarly affording the capability of discriminatorily interfering with an individual's employment opportunities with another employer, would be to condone continued use of the very criteria for employment that Congress has prohibited.

As recently stated in *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1234 (3d Cir. 1994, *cert. granted and judgment vacated*, 115 S. Ct. 1397 (1995):

> The anti-employment discrimination laws are suffused with a public aura for reasons that are well known...Congress has responded to...pernicious misconceptions and ignoble hatreds with humanitarian laws formulated to wipe out the

> inequity of discrimination in employment, not merely to recompense the individuals so harmed but principally to deter future violations.
>
> The anti-discrimination laws Congress enacted consequently resonate with a forceful public policy vilifying discrimination.

Without *petitioner* engaging in his protected conduct, the *respondent's* prohibited conduct would not have occurred when it did, which is the essence of "retaliation."

The sworn response of the *respondents* explicitly supports these facts. Since there is simply no genuine issue of material fact or law that justifies a trial on the issue of retaliation *petitioner's* cross motion for partial summary judgment should have been granted on these grounds. However, not only did the lower Courts fail to rule on this matter, further efforts to uncover the true scope and extent of this blacklisting by the *respondent* have been blocked by the District Court. *Respondent* has failed to produce discovery, and was allowed to do so by Magistrate Crigler, regarding other job reference letters sent out to prospective employers.

Respondent has admitted to providing references for Collin to prospective employers. It is unknown at this time how extensively the *respondents* blacklisted *petitioner*, but whatever its extent, it directly contravenes the will of Congress and the people of the United States to eliminate the threat of retaliation against those who protest racism in employment and in higher education. The *petitioner* has suffered the very stigma Title VII seeks to avoid in terms of loss of employment and career shattering blacklisting.

Respondent's actions go far beyond tenure denial, and require the *petitioner* to bring this action to seek employment and prevent further damage to his career due to the illegally retaliatory letters and telephone calls spewing from the *respondents*. Unlawful discrimination was the one and only motivation for the *respondent's* letter. The facts of the Beatley letter are uncontroverted, and *respondent* cannot state any fact or produce any evidence of a genuine issue of material fact with regard to this specifically illegal activity.

B. The *Petitioner's* Engagement In Constitutionally Protected Activities Caused *Respondent* to Retaliate Against *Petitioner*

Assisting in the vindication of civil rights is activity protected under the First Amendment of the Constitution of the U.S. *Sanchez v. City of Santa Ana*, 936 F.2d 1027 (9th Cir. 1990), *cert. denied*, 112 S.Ct. 417 (1991). Protection against retaliation for the exercise of free speech extends to private communications between the employee and the employer on issues of genuine public concern, such as the employer's treatment of women and minorities. *Givhan v Western Line Consolidated School District*, 439 U.S. 410 (1979)(Justice Renquist) *Rosenberger v. University of Virginia*, 515 U.S. 819, 831 (1995)(Justice Kennedy). *Petitioner* should have been allowed to teach his class about the African American community without the threat, and actuality, of retaliation by his employer. *Petitioner's* class was forbidden to enter the African American community. No other faculty were so restricted. Only *petitioner* was restricted because of the context and substance of his views on racial justice

and social equity. As noted recently by this Court, per Justice Kennedy:

> The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. *Rosenberger v. University of Virginia,* 115 S.Ct. 2510, 2516 (1995).

Respondent effectuated his threats of reprisals less than six months later using his decisionmaking power over *petitioner's* tenure and promotion. In pure retaliation, *respondent* deprived *petitioner* of his promotion and employment, a substantial benefit.

Racism is undeniably a matter of public concern. The content of his speech and expression was of immediate interest to the public because the African American residents feared continued displacement by the University. *Jurgensen v.Fairfax County,* 745 F.2d 868 (4th Cir. 1984). Because of this, *petitioner* lost his job, promotion, and future employment prospects. The very person who personally prohibited him from going into the African American community, Dean Porter, made the decision to terminate *petitioner* shortly thereafter. *Respondents* denied *petitioner* employment on the basis of his

protected speech, which satisfies the 'but for' causation requirement for liability. The Fourth Circuit has recently held:

> That the University, a public institution, 'cannot condition public employment on a basis that infringes [Simon's] constitutionally protected interest in freedom of expression' is beyond question. *Connick v. Meyers*, 461 U.S. 138, 142 (1983)(Justice White). *Simons v. West Virginia University*, 1996 WL 228617, 228620 (4th Cir. May 1996).

All retaliation for engagement in each and every protected activity is a violation of both Title VII and the First Amendment. None of these incidents are isolated or remote, but are part of the retaliatory fabric of *petitioner's* employment with the *respondent* after he was unanimously reappointed by the *respondent*, and participated in explicitly protected activities.

This Court recently discussed the concept of freedom of expression specifically applied to the *Respondents*. In discussing the danger to liberty interests at Universities this Court stated, per Justice Kennedy:

> The second, and corollary danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. *Rosenberger v. University of Virginia*, 115 S.Ct. 2510, 2519 (1995).

If an individual is forever denied equal employment opportunities because of his engagement in statutorily and constitutionally protected activities at a state university, then the Congressional intent of the 1964 Civil Rights Act is thwarted, and our society loses the benefit of academic freedom in an increasingly diverse world. The Constitution requires judicial vigilance whenever governmental action limits or impedes the exercise of First Amendment freedoms. This case involves one of these basic freedoms - freedom of speech on matters of political and public concern. And it arises in a context compelling the greatest latitude for the free expression of ideas - a school classroom at a public university. Racial equality in employment and academic freedom are very important questions for the nation's future, and for this case.

II. Basic Constitutional Procedural Due Process and Separation of Powers Were Violated to Protect Racist Practices of the *Respondent*

Fundamental Due Process requires that judicial cases be presided over by an impartial judge.

28 USC 455 (a) provides:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Magistrate Crigler is paid by the *respondents* to teach in the law school at the *respondent* and was one of the few adjunct professors at the law school to receive a salary for his services. Any order issued by Magistrate Crigler is void from the start because he did not recuse himself as required by 28 USC s 455(a)and (b). Magistrate Crigler did recuse himself from the *Scallet* case on the same grounds which affected him in this matter. *Scallet v. Rosenblum,* 106 F.3d 391 (1997).

In the *Scallet* case, Scallet was an employee of the Darden School of Business

at the University of Virginia. Magistrate Crigler is paid by the Law School of the University of Virginia. The subject matter of *petitioner's* case is the exact subject matter of the Magistrate's employment. *Petitioner* sought and was denied discovery by the Law School at the University of Virginia, and if a lay observer would entertain a significant doubt about the judge's impartiality in the *Scallet* case, then there is no doubt whatsoever that a lay observer, or any reasonable observer, would entertain a significant doubt about Magistrate Crigler's impartiality in the *Petitioner's* case. A judge must recuse himself when

> "an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 859-860 (1988)(Justice Stevens).

Dean Thomas Jackson hired Magistrate Crigler, and had the power to fire him. This is the same man who the Magistrate later relied upon for an allegedly independent review of *petitioner's* file

in dismissing *petitioner's* civil and constitutional rights.[2] Despite many requests for discovery directed to the law school, as to possible retaliatory activities connected with his wife's uncivil rejection from the law school by the law school, the law school's review of *petitioner's* publications in his tenure review, interaction the *respondent* had with students on the law review regarding *petitioner's* submitted articles, and any reference letters or telephone calls to prospective employers of the *petitioner*, Magistrate Crigler allowed the *respondents* to produce nothing - not one set of minutes, not even the committee membership. Courts routinely order the production of personnel files of third parties in employment discrimination cases. *E.E.O.C. v. University of New Mexico,* 504 F.2d 1296 (9th Cir. 1974); *Orbovich v. Macalester College,* 119 F.R.D. 411 (d. Minn. 1988); and *University of*

2. Thomas Jackson was not an independent decisionmaker without "any hint of racial bias", *Collin v. University of Virginia, 1995 WL 21956, 21958,* (1998). Jackson sent at least one memorandum regarding *Petitioner's* EEOC suit. (Record on Appeal 805). At least one member of Jackson's "independent review" was a member of the Architecture School Committee. Jackson's committee rubber-stamped the racial bias of that committee.

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Pennsylvania v. Equal Employment Opportunity Commission, 493 U.S. 182 (1990)(Justice Blackmun).

A judge is under a self-enforcing obligation to recuse himself where legal grounds exist for disqualification. "Neither actual partiality, nor knowledge of the disqualifying circumstances on the part of the judge during the affected proceeding, are prerequisites for disqualification under this section." *US v. Kelly,* 888 F.2d 732, 744 (11th Cir.1989). *Petitioner* did not know of these grounds for recusal until the end of discovery period but both the Magistrate, and the *respondents*, were well aware of these grounds, and neither made them known to *petitioner*, nor raised them themselves as ethically required. The record reveals that these conflicts actually affected Magistrate Crigler. He sealed depositions without notice, motion, hearings or briefs from the *petitioner*, contrary to law. *Rushford v. New Yorker Mag. Inc.*, 846 F.2d 249 (1988). He refused to let *petitioner* depose two key witnesses relied upon in his decision, excluded *petitioner* from the deposition of his own witness, allowed *respondents* to depose witnesses without notice, allowed *respondents* to rely on secret depositions, allowed

respondents to refuse to pay *petitioner* the normal witness fees in the *Harris* case, and thwarted all *petitioner's* requested discovery from the University of Virginia School of Law, his employer. This information would have solidified *petitioner's* case, and exposed the true depth of pernicious racism that infect's *respondent's* law school employment practices.

The basic concept of the separation of powers requires an impartial judge, not swayed by employee loyalty to another branch of government. It is the basis of our individual liberty. The reasoning for this is:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands...may justly be pronounced the very definition of tyranny. Calabresi & Larson, *One Person, One Office: Separation of Powers or Separation of Personnel?* 79 Cornell L. Rev. 1045, 1045 n. 1(1994)(citing *The Federalist No. 47 at 301* (James Madison)(Clinton Rossiter ed., 1961).

This was explicitly incorporated into the U.S. Constitution. As noted by our founding fathers:

> ...unless these departments be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires, as essential to free government, can never be duly maintained. *The Federalist No. 48, at 308* (James Madison)(Clinton Rossiter ed., 1961).

This requires the executive branch and the judicial branch to maintain separation in decisionmaking forums, especially where constitutional claims are raised. "The *respondent* is an instrumentality of the Commonwealth for which it is named." *Rosenberger v. University of Virginia,* 115 S.Ct. 2510, 2513 (1995) Therefore, the Magistrate Judge is an employee of the Commonwealth of Virginia. An employee of a state agency, Professor Crigler, exercised judicial discretion and decisionmaking power to dismiss a well substantiated employment discrimination and First Amendment case against his employer. In this case one man held two offices, and decided a case brought against one of those offices. On the ground of a violation of the Separation of Powers doctrine, the decision of Magistrate Crigler should be vacated.

III. *Hicks* Requires Full And Complete Discovery to Effectuate the Purposes of Title VII

A major concern of the Supreme Court in *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 was that employers would not produce discovery and thus deny the Appellant a meaningful opportunity to pursue his legislatively and constitutionally protected rights. In Title VII cases restrictions on discovery are historically disfavored. *Trevino* v. *Celanese Corp.*, 701 F2d 397 (5th Cir. 1963). Dissenting in *Hicks*, Justice Souter indicated that the majority decision:

> "saddle[s] the victims of discrimination with the burden of either producing direct evidence of discriminatory intent or eliminating the entire universe of possible nondiscriminatory reasons for the personnel decision" *St. Mary's Honor Society v. Hicks,* 113 S.Ct. 2742, 2758(1993).

Given the *Hicks* decision, the Fourth Circuit should have allowed *petitioner* access to all deposed witnesses,

especially if they were relied upon in summarily judging this case. Under these circumstances, a motion for summary judgment disposing of all of these very real, thoroughly documented, and important issues should not issue under a legally objective standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel of Record

November 25, 1998

APPENDIX

Unpublished Disposition
1998 WL 637420 (4th Cir.(Va.))

Robert W. COLLIN,
Plaintiff-Appellant,

v.

RECTORS AND VISITORS OF THE UNIVERSITY OF VIRGINIA, Department of Urban and Environmental Planning; William Lucy; David Phillips; A. Bruce Dotson; Richard Collins; Daphne Spain; Timothy Beatley; Harry Porter, Defendants-Appellees.

No. 96-1078.

United States Court of Appeals, Fourth Circuit.

Aug. 31, 1998.

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville. B. Waugh Crigler, Magistrate Judge. (CA-93-74-C).

Margaret M. Cain, Charlottesville, Virginia, for Appellant.

Earl C. Dudley, Jr., Associate General Counsel & Special Assistant Attorney General, Lee E. Goodman, Associate General Counsel & Special Assistant Attorney General, UNIVERSITY OF VIRGINIA, Charlottesville, Virginia, for Appellees.

Before NIEMEYER and MOTZ, Circuit Judges, and HALL, Senior Circuit Judge.

OPINION

PER CURIAM

*1 Robert W. Collin was a tenure-track faculty member of the Department of Urban and Environmental Planning in the University of Virginia's School of Architecture. Despite renewing Collin's initial appointment, at the end of Collin's evaluation period, the faculty of the School did not extend Collin an offer of tenure. Collin appealed this decision directly to the Provost. With the aid of two of the members of the Promotion and Tenure Committee, Provost Thomas Jackson conducted a de novo review of Collin's record. Based on the reviews of Collin's body of academic work by the committee members, Provost Jackson's own review of Collin's work, and the consensus of the Provost's eleven-member Promotion and Tenure Committee, Provost Jackson denied Collin's request for tenure.

As a result of this decision, Collin filed this action alleging that the University of Virginia and several of its faculty members had engaged in racial discrimination in the tenure decision process. In addition, Collin alleged that the tenure decision and other unfavorable employment decisions, such as office placement, computer service, telephone

service, funding decisions, research decisions and the threat of a harassment action were in retaliation for Collin's participation in various protected activities. Collin placed special emphasis on a letter from the chair of the Urban and Environmental Planning Department at the University of Virginia to his counterpart at the University PAGE 2 of Oregon where Collin was applying for a position. In that letter, the chair described Collin's recent behavior as "bizarre" and "inconsistent." Collin filed a motion for partial summary judgment on this evidence of retaliation alone. However, on the Defendant's motion, the magistrate judge granted summary judgment in favor of the University and its faculty and dismissed the action. This appeal followed.

This court reviews grants of summary judgment in discrimination cases de novo. See Jones v. Wellham, 104 F.3d 620, 626 (4th Cir.1997). Summary judgment is properly granted if the movant can show that there is no material fact in dispute when viewing the evidence in the light most favorable to the nonmovant. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). To establish a prima facie case of discriminatory discharge, Collin must show: (1) he is a member of a

protected class; (2) he was qualified for the job and performed satisfactorily; (3) in spite of his qualifications and performance, he was discharged; and (4) the position remained open to similarly qualified applicants after his dismissal. See Carter v. Ball, 33 F.3d 450, 458 (4th Cir.1994). This case is somewhat unusual in that Collin himself is white; his basis for claiming membership in a protected class is that his wife is African-American. Hampered by the parties' failure to provide any judicial authority, persuasive or otherwise, the magistrate judge concluded that Collin's marriage was not sufficient to qualify him as a member of a protected class. As a result, the magistrate judge held that Collin could not make out a prima facie case of discriminatory discharge. *2 Although the parties did not err in asserting that this court has no published authority directly on point, it is generally accepted that the spouses of members of protected parties may be able to make out a prima facie case of discriminatory discharge. See Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir.1986); see also Fiedler v. Marumsco Christian Sch., 631 F.2d 1144, 1150 (4th Cir.1980) (reaching

a similar conclusion in a case under 42 U.S.C. s 1981 (1994)). That is true because the plaintiff is alleging "by definition, that he has been discriminated against because of his race." Parr, 791 F.2d at 892. Prudently, the magistrate judge did not rest his decision solely on this conclusion. The magistrate judge also determined that Provost Jackson's decision, untainted as it was by any hint of racial bias, broke any chain of causation from Collin's evidence of bias regarding the tenure decision at the Departmental level.

Especially in light of the "great trepidation" with which federal courts act in the consideration of tenure decision discrimination claims by aggrieved professors, Collin has failed to made out a prima facie case of discriminatory discharge. See Jiminez v. Mary Washington College, 57 F.3d 369, 376-77 (4th Cir.1995). We "operate with reticence and restraint regarding tenure-type decisions" resulting in a necessarily narrow review. Id. at 377. Consequently, we must determine only whether Collin's promotion was denied because of a discriminatory reason. Id. The record is bereft of evidence that the ultimate decision-making party, the Provost, reached his decision based on anything other than academic reasons.

Collin admitted in his deposition that he had no evidence of an impermissible motivation on Provost Jackson's part. The record shows that Provost Jackson considered Collin's scholarship to be of inferior quality. This opinion did not stem from any discriminatory determination. Rather, it was based on Jackson's own review of Collin's body of work in combination with the review of other members of the Promotion and Tenure Committee. Without acting as a "super personnel council," and without a hint of reliance on a discriminatory reason by this body, we cannot find that Collin advanced a prima facie case of discriminatory discharge. Id. at 376.

On appeal, Collin claims that the Provost's review was not "untainted." He suggests that because the Provost, in his capacity as the Dean of the Law School, did not extend an offer of faculty employment to Collin's wife, he could not have afforded Collin's candidacy an independent review. Collin also suggests that because Provost Jackson ultimately declined to offer Collin tenure, the Provost's review was not independent. Finally, Collin contends that because Provost Jackson appointed the magistrate judge who decided this case to the

faculty of the University of Virginia School of Law at some time before this lawsuit was ever contemplated, the Provost's review was not independent. This line of argument mistakes our limited review. The inquiry is not to determine whether the final decisionmaker was "independent," but rather, whether the decision was made for a discriminatory reason. There is simply no evidence that it was.

*3 Similarly, Collin invites this court to reweigh the merits of his scholarship against its deficiencies seeking a more favorable decision from this court than from his colleagues. We decline to do so. We are surely not as qualified to evaluate the quality of Collin's research and writing in the context of the standards of the Department of Urban and Environmental Planning in the School of Architecture at the University of Virginia as its own faculty. Furthermore, it is not the role of the federal court to assess the quality of a professor's scholarly work. In the absence of evidence of a discriminatory reason, there is no cause to conclude that the University's decision was in violation of Title VII.

Turning to Collin's claim of retaliation for his protected activities, in order to establish a prima facie case

of retaliation, Collin must prove: (1) he engaged in a protected activity; (2) the University took adverse employment action against him; and (3) a causal connection existed between the protected activity and the adverse action. See Carter, 33 F.3d at 460. The magistrate judge concluded that all events described by Collin as retaliatory were explained by legitimate nondiscriminatory reasons that were rebutted only by Collin's claims that they were racially motivated. See, e.g., Wright v. National Archives & Records Serv., 609 F.2d 702, 716 (4th Cir.1979).

Collin has shown that he engaged in numerous protected activities, including his marriage, his research and advocacy, his conversations with the press, and ultimately the filing of his EEOC complaint. Taken in a light most favorable to Collin, the actions taken by the Department and its members could be construed as adverse. However, in each instance of allegedly retaliatory action, Collin has failed to establish the crucial causal connection between that action and his protected activities. None of the evidence of record even suggests that any of the specific actions on the part of the Department were motivated by

Collin's identified protected activities. In attempting to assign error to the magistrate judge's order by asserting that such a connection exists, Collin either badly mischaracterizes the evidence of record, or relies on the stray comments of non-decision makers. While derogatory remarks may be direct evidence of discrimination, see Wilhelm v. Blue Bell, Inc., 773 F.2d 1429, 1433-34 (4th Cir.1985), "Title VII was not designed to create a federal remedy for all offensive language and conduct in the workplace." Hopkins v. Baltimore Gas & Elec., 77 F.3d 745, 754 (4th Cir.), cert. denied, --- U.S. ----, 117 S.Ct. 70, 136 L.Ed.2d 30, 65 U.S.L.W. 3240 (U.S. Oct. 7, 1996) (No. 95-1961). The allegedly discriminatory remarks, therefore, cannot be stray or isolated statements. According to the Seventh Circuit, "[u]nless the remarks upon which plaintiff relies were related to the employment decision in question, they cannot be evidence of [discrimination]." See McCarthy v. Kemper Life Ins. Co., 924 F.2d 683, 686-87 (7th Cir.1991). The comments identified by Collin were not so related, and are not, therefore, evidence of discrimination.4 Because Collin based his motion for partial summary judgment solely on it, his claim regarding the letter to a prospective employer warrants

some further analysis. [FN*] Negative references to potential employers may constitute sufficient adverse action to state a retaliation claim. See Robinson v. Shell Oil Co., 519 U.S. 337, ----, 117 S.Ct. 843, 136 L.Ed.2d 808, 65 U.S.L.W. 4103, 4104-05 (U.S. Feb. 18, 1997) (No. 95-1376). Here, the magistrate judge concluded that the letter was not sufficient to support a claim of retaliation because Collin did not show that he did not get the position at the University of Oregon because of the comments therein. However, because the dissemination of adverse information with an impermissible motive is itself the violation of Title VII, Collin's ultimate success or failure in obtaining the position is beside the point. Id.

FN* In light of our conclusion regarding the merits of this claim, we need not revisit the magistrate judge's determination that Collin's motion for partial summary judgment was untimely. In addition, we note that such a review would result in speculation on the part of this court, as the magistrate judge concluded that the motion was not filed in accordance with his pre-trial order. The terms of that order are not preserved in the record on appeal.

The Defendants focus on the fact that the letter pre-dated Collin's EEOC complaint. Because of this chronology, contends the University, the letter could not have been retaliatory. This assertion does not account for the possibility that the letter was in retaliation for other protected activities, such as the comments to the press referenced in the letter, which preceded the drafting of the letter. However, as the magistrate judge correctly noted, the letter was not sufficiently adverse to Collin to serve as the basis for a Title VII claim. Although it described Collin's recent activities as "bizarre" and "inconsistent," the letter was apparently motivated by a request for information from the potential employer and primarily served as a cover letter for several newspaper articles reporting Collin's own comments. Moreover, the admissibility of this documentary evidence is dubious at best. Although Collin claims on appeal that the letter was on departmental stationery, typed by a secretary, and signed by the department chair, none of those indicia of reliability are apparent from the document contained in the record on appeal. See Fed.R.Evid. 901(a). The ruling on the summary judgment motion must be made on such evidence as was admissible. Fed.R.Civ.P. 56(e).

Consequently, the letter does not support a claim for retaliatory discrimination. Collin's remaining two claims need not detain us for long. Collin first suggests that the magistrate judge erred by failing to recuse himself from consideration of this case based on his employment with the University of Virginia School of Law. This claim is completely without merit. Not only did Collin wait until after the magistrate judge entered an order adverse to his cause of action to raise this issue, but Collin presented his concern regarding the magistrate judge in a pro se response to the Defendants' motion for costs.

The response to a post-judgment motion is not the appropriate time or vehicle for such a complaint. See 28 U.S.C. ss 144, 455 (1994). Moreover, Collin consented to the jurisdiction of the magistrate judge and agreed that the magistrate judge should be empowered to enter a dispositive order in his case. See 28 U.S.C. s 636(c) (1994). An appellant may not complain on appeal of errors he has himself induced or invited. See Brown v. Presbyterian Healthcare Servs., 101 F.3d 1324, 1332 (10th Cir.1996), cert. denied, --- U.S. ----, 117 S.Ct. 1461, 137 L.Ed.2d 564, 65

U.S.L.W. 3689 and --- U.S. ----, 117 S.Ct. 1461, 137 L.Ed.2d 564, 65 U.S.L.W. 3693 (U.S. Apr. 14, 1997) (No. 96-1365); Cranston Print Works Co. v. Public Serv. Co., 291 F.2d 638, 649 (4th Cir.1961). Consequently, we decline to consider Collin's eleventh hour assertion that the magistrate judge should have been recused from the case.

*5 Finally, Collin makes an ill-formed complaint about the magistrate judge's determinations in limiting the scope of discovery. In doing so, he cites no document in the record before us and fails to identify error in a single ruling on the part of the magistrate judge with respect to discovery. Neither does he make any discovery ruling a part of the record on appeal. Furthermore, Collin does not proffer what he expected to discover but for the alleged errors of the magistrate judge. Consequently, Collin's bald allegation of error in discovery does not give this court cause to disturb the magistrate judge's ruling.

Finding that the magistrate judge did not err in granting summary judgment to the Defendants on Collin's claims of discrimination, and finding no merit to any of Collin's assignments of error, we affirm. We dispense with oral argument because the facts and legal contentions are adequately presented in the

materials before the court and argument would not aid the decisional process.
AFFIRMED

Supreme Court, U.S.
FILED
DEC 23 1998
OFFICE OF THE CLERK

No. 98-900

In The

Supreme Court of the United States

October Term, 1998

ROBERT W. COLLIN,

Petitioner,

v.

RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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12 pp

QUESTIONS PRESENTED

1. Whether the two courts below erred in their determination that petitioner, a white male, had failed to present evidence from which a reasonable jury could have found that respondents denied him tenure because he was married to an African-American woman and advocated racial equality for African-Americans, or that respondents retaliated against him because of his marriage, his advocacy, or his filing of a complaint of racial discrimination with the Equal Employment Opportunity Commission.

2. Whether the two courts below erred in finding that petitioner waived any objection he might have had to the participation of the Magistrate Judge where, after full disclosure of his teaching arrangement with the University of Virginia's School of Law, the Magistrate Judge offered to recuse himself, and petitioner indicated in writing his assent, not merely to the Magistrate Judge's participation, but to his rendering a final, binding decision pursuant to 28 U.S.C. § 636(a) (1994).

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STATEMENT OF THE CASE

Petitioner, a white male former assistant professor in the Department of Urban and Environmental Planning of the University of Virginia's School of Architecture, was denied tenure in 1992. He sued the University and his colleagues in the Department under 42 U.S.C. §§ 1981 and 1983 (1994), claiming that he was the victim of racial discrimination and of retaliation for protected activities. After full discovery, the United States District Court for the Western District of Virginia concluded that petitioner had failed to produce evidence on which a reasonable jury could decide in his favor and granted summary judgment for the defendants. The United States Court of Appeals for the Fourth Circuit, following a *de novo* review of the record, affirmed.

The Denial of Tenure

The gravamen of petitioner's complaint was not reverse discrimination; instead, he claimed that he was denied tenure because he was married to an African-American woman and because he advocated racial equality for African-Americans. The court of appeals, however, found that "[t]he record is bereft of evidence that the ultimate decision-making party, the Provost, reached his decision based on anything other than academic reasons." Pet. App. e.[1]

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[1] Citations to "Pet. App. ___" are to the appendix to the petition for a writ of *certiorari*, the pages of which are given letter, rather than numerical, designations.

Petitioner was hired as an assistant professor on a three-year contract in 1986. During his "job talk" – a lecture delivered by all faculty candidates – he announced, for no apparent reason, that he was dating an African-American woman and intended to marry her. App. 2008-09.[2] Thereafter, he was extended an offer and accepted. *Id.* 1895-96. Three years later, in 1989, petitioner married his fiancee and announced this fact to his colleagues in the Department of Urban and Environmental Planning. *Id.* 1923-25. Thereafter, his contract was renewed for an additional three years. *Id.* 1905-07. When he was evaluated for tenure in 1992, six of his seven departmental colleagues voted to recommend denial based on the substandard quality of his published scholarship. The Architecture School's Promotions and Reelections Committee reviewed petitioner's scholarship and agreed unanimously with the departmental recommendation. *Id.* 1674.

Petitioner appealed the negative decision of the Architecture School to the Provost of the University, Thomas Jackson. *Id.* Mr. Jackson appointed a two-person subcommittee of the University-wide Promotions and Tenure Committee to advise him in the matter. Both members of this subcommittee, neither of whom served in the Architecture School, reviewed petitioner's scholarship in detail and found it shallow, lacking in originality, duplicative of other work, and poorly written. *Id.* 1724-27, 1754-56. Provost Jackson himself reviewed petitioner's

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[2] Citations to "App. ___" are to the appendix in the Court of Appeals, prepared and filed by petitioner's counsel. *See* note 3 *infra*.

work in detail. *Id.* 1677. He agreed with the assessment of his subcommittee. In addition, he found petitioner's writing flawed by serious research errors that "fundamentally skew[ed] his conclusions." *Id.* For example, petitioner asserted in his major article, which dealt with environmental racism, that "[f]ifty-three percent of U.S. African-Americans live in the southern states of Alabama, Louisiana, Oklahoma, South Carolina, and Texas and one third of the hazardous waste landfills are located in these states." Skeptical of this assertion, Mr. Jackson checked 1990 census data, which showed that only 18.7 percent of African-Americans resided in the five listed states. In a memorandum to the file, the Provost concluded that petitioner's scholarship used facts carelessly, exaggerated claims of its originality, lacked a coherent focus, and was internally inconsistent. *Id.* 1716-19. Mr. Jackson wrote to petitioner denying his tenure application, explaining that he found "the scholarship to be deeply flawed and substantially below the quality that would be necessary for tenure." *Id.* 1721-22.

After reviewing the record *de novo*, the court of appeals concluded:

> The record is bereft of evidence that the ultimate decision-making party, the Provost, reached his decision based on anything other than academic reasons. [Petitioner] admitted in his deposition that he had no evidence of an impermissible motivation on Provost Jackson's part. The record shows that Provost Jackson considered [petitioner's] scholarship to be of inferior quality. This opinion did not stem from any discriminatory determination. Rather, it was based on Jackson's own review of [petitioner's] body of

> work in combination with the review of other members of the Promotion and Tenure Committee. Without acting as a "super personnel council," and without a hint of reliance on a discriminatory reason by this body, we cannot find that [petitioner] advanced a prima facie case of discriminatory discharge.

Pet. App. e-f.

The Claimed Retaliation

Petitioner claimed that the University retaliated against him in numerous ways, including office assignments, computer access, and unfavorable comments to a prospective employer, because of his marriage, his research on racial topics, his advocacy, his complaints to the press, and his filing of a complaint with the Equal Employment Opportunity Commission. The Magistrate Judge concluded that the respondents had pointed to legitimate non-discriminatory reasons for each action complained of, and that petitioner had offered nothing but his unsupported claims of racial or retaliatory motivation.

The Court of Appeals found:

> [Petitioner] has shown that he engaged in numerous protected activities, including his marriage, his research and advocacy, his conversations with the press, and ultimately the filing of his EEOC complaint. Taken in the light most favorable to [petitioner], the actions taken by the Department and its members could be construed as adverse. However, in each instance of alleged retaliatory action, [petitioner] has failed to establish the crucial causal connection

> between that action and his protected activities. None of the evidence of record even suggests that any of the specific actions on the part of the Department were motivated by [petitioner's] identified protected activities.

Pet. App. h-i. Moreover, the Court of Appeals went on to state that "[i]n attempting to assign error to the magistrate judge's order by asserting that such a connection exists, [petitioner] either badly mischaracterizes the evidence of record, or relies on the stray comments of non-decision makers." *Id.* at i.

Focusing specifically on the letter to a prospective employer, the Court of Appeals noted that "[n]egative references to potential employers may constitute sufficient adverse action to state a retaliatory claim." *Id.* at j, *citing Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). However, the Court went on:

> as the magistrate judge correctly noted, the letter was not sufficiently adverse to [petitioner] to serve as the basis for a Title VII claim. Although it described [petitioner's] recent activities as "bizarre" and "inconsistent," the letter was apparently motivated by a request for information from the potential employer and primarily served as a cover letter for several newspaper articles reporting [petitioner's] own comments.

Id. at j.[3]

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[3] In addition, the Court of Appeals noted that the evidence petitioner submitted concerning the letter was of "dubious [admissibility] at best." Pet. App. k. Petitioner claimed that the letter was on departmental stationery, was typed by a department secretary, and was signed by the chair of the

The Litigation

Petitioner asserted that the Magistrate Judge should have recused himself because he taught a course in Trial Advocacy at the University of Virginia's Law School and that he improperly limited petitioner's discovery efforts.

At the outset of the litigation the Magistrate Judge disclosed on the record that he regularly taught a seminar in Trial Advocacy at the Law School and invited either party to object to his participation in the case. Thus fully informed, petitioner consented in writing, not merely to the Magistrate Judge's continued participation in the case, but to his conducting the full proceeding and rendering a dispositive decision pursuant to 28 U.S.C. § 636(c) (1994). Petitioner never filed a motion to recuse the Magistrate Judge nor objected to any of the Magistrate Judge's actions until after the grant of summary judgment against him. Then, in an opposition to respondents' motion for an award of costs, petitioner for the

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department. However, "none of these indicia of reliability are apparent from the document contained in the record on appeal." *Id.* The numerous deficiencies of the record on appeal were solely petitioner's responsibility. As respondents noted in their brief in the Court of Appeals, the six-volume, 2056-page "Joint Appendix," which contains multiple copies of many documents and none of others, "was not the product of any cooperative effort" between the parties as contemplated by Fed. R. App. P. 30(b). Brief for Appellees 3 n.3. Petitioner's counsel made no effort to contact respondents concerning the appendix but apparently simply copied her entire case file, with no effort at organization or at distinguishing between items that were actually part of the record in the district court and those that were not.

first time asserted that the Magistrate Judge's participation was improper. The Court of Appeals found that petitioner had waived any objection he might have had to the Magistrate Judge's participation. Pet. App. l-m.

Petitioner also asserted without elaboration that the Magistrate Judge improperly limited his discovery. In fact, the Magistrate Judge's scheduling order gave the parties nine months for the conduct of discovery. The discovery cutoff was extended by the Magistrate Judge twice at petitioner's request. Nonetheless, petitioner failed to depose a single defendant or the decisionmaker, Provost Jackson.

On this issue, the Court of Appeals noted that

> [petitioner] cites no document in the record before us and fails to identify error in a single ruling on the part of the magistrate judge with respect to discovery. Neither does he make any discovery ruling a part of the record on appeal. Furthermore, [petitioner] does not proffer what he expected to discover but for the alleged errors of the magistrate judge. Consequently, [petitioner's] bald allegation of error in discovery does not give this court cause to disturb the magistrate judge's ruling.

Pet. App. m.

REASONS TO DENY THE WRIT

This Case Presents No Issues of National Significance, but Turns Solely Upon the Factual Determinations of the Two Courts Below.

The petition presents no reason why this Court should grant the writ of *certiorari*. It points to no conflict between the decision below and any other lower-court decision on any issue of law. There is no decision of this Court that conflicts with the decision below. Nor does the case present any issue of great national significance requiring resolution by the Court. Instead, the petition obliquely and tendentiously seeks to reargue the factual conclusions reached by the two courts below, and it does so without rational or comprehensible citation to evidence in the record. The courts below merely determined that petitioner had failed to carry his burden of production under established and well-understood standards for the grant of summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Moreover, it is well established that this Court does not sit to review factual determinations, especially where they are the product of agreement between two lower courts. *E.g., Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 318 n. 5 (1985); *United States v. Doe*, 465 U.S. 605, 614 (1984); *United States v. Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975). *See also, e.g., Southern Power Co. v. North Carolina Pub. Serv. Co.*, 263 U.S. 508 (1924); *Houston Oil Co. v. Goodrich*, 245 U.S. 440 (1918).

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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No. 98-900

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1998

ROBERT W. COLLIN
Petitioner,

v.

UNIVERSITY OF VIRGINIA, William Lucy; David Phillips; A. Bruce Dotson; Richard Collins; Daphne Spain; Timothy Beatley; and Harry Porter,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Dated: December 31, 1998

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QUESTIONS PRESENTED

I. Can a state university professor be blacklisted and employment terminated for advocating for racial equality under the law?

II. Can a paid employee of the Commonwealth of Virginia adjudicate a race discrimination case against his employer?

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REASONS TO GRANT THE WRIT

This Case Presents Important Judicial Issues of National Significance.

With the advent of the 1964 Civil Rights Act, and subsequent amendments to include Colleges and Universities, Racial diversity in publicly funded higher education is a fact of life. Faculty, students, and administrators all over the United States, including the Commonwealth of Virginia, must confront issues associated with racial diversity, such as affirmative action in admissions, ethnic studies, and employment. Academia should be an ideal forum for leadership on these issues, but job blackmail and retaliation preclude free and full discussions of racism on campuses across the nation. By ending the promising career for a prominent young scholar for his racial advocacy, the *Respondents* have set an example others will heed. Fear of ending a career will silence those academics without tenure, and will encourage institutions with serious racial problems to blacklist their critics.

Furthermore, the intentional

blacklisting of a nationally recognized scholar for involvement in constitutionally protected activities only serves to ultimately increase racial conflict in American society. Issues of race are unavoidably important in both the administration of higher education, and in the content of a Professor's class. Academic freedom is to protect scholarly endeavors, but on issues of race have not because of the lack of clear judicial direction. This lack of direction will not stem the flow of cases like the one at bar because of the increasingly diverse nature of US society and higher education. The resolution of these issues is difficult. The conflict and lack of judicial guidance on the substance exacerbates these increasing and unavoidable issues. The procedural arguments raised by *Respondent* do not address these nationally significant issues.

Racial equality and academic freedom are two of the highest held ideals in law and society. Academic freedom began its U.S. legal history in 1952. The dissent by Justice Douglas in the *Adler v. Board of Education* case was the first time academic freedom was expressly mentioned by the US Supreme Court. 342 US 485

(1952)(Justice Douglas dissenting). Justice Douglas used the phrase "academic freedom" three times, all in connection to the First Amendment. It was in this case that academic freedom was expressly tied to the First Amendment in an academic context. This case also set the tone for subsequent jurisprudence in this area. In the case of *Sweezy v. New Hampshire,* 354 U.S. 234 (1957), the Supreme Court overturned a contempt conviction of teacher for refusal to answer questions about a classroom lecture. Here again the Court addressed the underpinnings of academic freedom, this time in language from Chief Justice Warren.

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straitjacket upon the intellectual leaders in our colleges and universities would imperil the future of the Nation...Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our

> civilization will stagnate and die. *Id.* at 250.

In *Keyishian v. Board of Regents,* 385 U.S. 589 (1967), the Supreme Court held that:

> ...public employment, including academic employment, may [not] be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action. *Id.*

This case marked the first time the principle of academic freedom was distinctly recognized by a majority of the Supreme Court. The majority stated:

> Our nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom....The classroom is peculiarly the market place of ideas. *Id.* at 603.

This protection is applicable to states through the concept that free speech is a liberty protected against state infringement by the Due Process Clause of the Fourteenth Amendment. *Pickering v. Bd. of Education,* 391 U.S.

563 (1968). Protection against retaliation for the exercise of free speech extends to private communications between the employee and the employer on issues of genuine public concern, such as the employer's treatment of women and minorities. *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979).

As noted recently by this Court when deciding another first amendment case against the *Respondent*:

> It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. (citing *Police Dept. of Chicago v. Mosely*, 408 U.S. 92, 96 (1972) *Rosenberger v. University of Virginia*, 115 S.Ct. 2510 (1995).

This Court went on to note that:

> ...when the government targets not the subject matter but the particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.... Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. ...Viewpoint

> discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations. *Id.*

This court also discussed the concept of freedom of expression specifically at the University of Virginia, within the same general timeframe of the case at bar. In discussing the danger to liberty interests at Universities this Court stated:

> The second, and corollary danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. *Rosenberger v. University of Virginia,* 115 S.Ct. 2510, 2519 (1995).

Racism generally is undeniably a matter of public concern. The inclusion of African Americans in the decisionmaking process of University of Virginia expansion into West Main Street is also undeniably a matter of public concern in Charlottesville, Virginia.

Petitioner engaged in speech on a matter of public concern - in his community service, local, state, and national legislative testimony on fair housing, his studies of race and housing in Charlottesville and Albemarle, his publications on environmental racism, and most importantly in his classroom. If an individual Professor is denied equal employment opportunities because of his position on issues of race, at a state university, then the Congressional intent of the 1964 Civil Rights Act is thwarted, and our society loses the benefit of academic freedom in an increasingly diverse world. If *Petitioner* cannot get a day in court based on judicial proceedings which were tainted by bias in the discovery stages, then the fundamental underpinnings of the U.S. justice system are jeopardized.[1] The Constitution requires judicial vigilance whenever governmental action limits or impedes the exercise of First Amendment freedoms. This case involves these basic freedoms - freedom of speech on matters

[1]. Contrary to *Respondent's* claim, *petitioner* did not agree to the Magistrate as Judge. When discovery at the law school was thwarted, and all case files secretly sealed, *petitioner* wrote directly to the Magistrate.

of political and public concern. And it arises in a context compelling the greatest latitude for the free expression of ideas - a university school classroom at a public university. *Jurensen v. Fairfax County*, 745 F.2d 868, 880 (4th Cir. 1984)(State inhibition of academic freedom is strongly disfavored) Racial equality in employment and academic freedom are very important questions for the nation's future, and for this case. If the Court allows this decision to stand, it will limit intellectual discourse and leadership on Race, increase judicial confusion in the lower courts, and lose a rare opportunity to begin healing racial strife.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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